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No. 03-1500

Supreme Court, U.S.
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In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

ERWIN CHEMERINSKY
Counsel of Record
DUKE UNIVERSITY
SCHOOL OF LAW
Science Drive & Towerview Rd.
Durham, North Carolina 27708
(919) 613-7173

MARK ROSENBAUM
1616 Beverly Blvd.
Los Angeles, California 90026
(213) 977-9500

PAUL HOFFMAN
SCHONBRUN DISIMONE SEPLOW
HARRIS & HOFFMAN
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

ADAM B. WOLF
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, California 90095
(310) 206-5454

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property on the walkway between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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The opinion of the United States Court of Appeals for the Fifth Circuit is published at 351 F.3d 173 (5th Cir. 2003). A copy of this opinion is included as Appendix A to the Petition for a Writ of Certiorari. The United States Court of Appeals for the Fifth Circuit denied *en banc* review on January 5, 2004. A copy of this order is included as Appendix B. The decision of the United States District Court is included as Appendix C.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. Const., Amend. I.

STATEMENT OF THE CASE

On the grounds of the Texas State Capitol there is a large – six feet high and three-and-a-half feet wide – granite

monument on which the Ten Commandments are etched. The monument is between the Capitol Building and the Texas Supreme Court, at the corner where the sidewalks in front of these buildings intersect. The Ten Commandments monument is approximately 75 feet from the Capitol building (Stipulation 7, J.A. at 91) and 123 feet from the Supreme Court building. Anyone walking on these sidewalks from the Capitol to the Supreme Court sees this prominently displayed monument.

The monument is in the shape of the tablets that some religions believe that God gave to Moses and contains the following words written in large letters:

> the Ten Commandments
> I AM the LORD thy God.
> Thou shalt have no other gods before me.
> Thou shalt not make to thyself any graven images.
> Thou shalt not take the Name of the Lord thy God in vain.
> Remember the Sabbath day, to keep it holy.
> Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.
> Thou shall not kill.
> Thou shall not commit adultery.
> Thou shall not steal.
> Thou shalt not bear false witness against thy neighbor.
> Thou shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife nor his manservant nor his maidservant, nor his cattle nor anything that is his neighbor's.

See Exhibit 21 (photograph of the monument) (J.A. at 137).*

On the monument, above the text of the Ten Commandments, there are two small tablets with what appears to be ancient script. Also above the Ten Commandments is a large American eagle grasping the American flag and an eye inside a pyramid, which is similar to the symbol on the one-dollar bill. At the bottom of the monument, below the Ten Commandments, there are two small Stars of David and also two Greek letters, Chi and Rho, superimposed over each other to represent Christ. Exhibit 42 (J.A. at 189-90) (explaining the significance of this symbol). These other symbols are much smaller than the text of the Ten Commandments, which occupies most of the space on the monument. Under the Ten Commandments are the words, "Presented to the people and youth of Texas by the Fraternal Order of Eagles of Texas, 1961."

Although there are several other monuments on the grounds of the Texas State Capitol, no other monument is visible from the Ten Commandments monument. Exhibits 48, 53, 57 (J.A. at 210, 211, 212) (photographs showing that there are no other monuments adjacent to or visible from the Ten Commandments monument). In the few-acre area north of the State Capitol, where the Ten Commandments are located, the other displays are a monument paying tribute to children in Texas (Exhibit 20, J.A. at 136), a statue of a pioneer woman holding a child (Exhibit 19, J.A. at 135), a replica of the Statute of Liberty (Exhibit 18, J.A. at 134), and a tribute to Texans who died at Pearl

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* A photograph of the monument is also included as Appendix C to the Petition for a Writ of Certiorari at 21.

Harbor (Exhibit 17, J.A. at 133). 351 F.3d at 176, App. A to Cert. Pet. at 3. The Ten Commandments monument is the closest to the Capitol of any monument in the area. (Stipulation 31, J.A. at 95). No other monument on the Capitol's grounds expresses a religious message.

The Ten Commandments monument is on government property and is owned by the State of Texas. (Stipulation 8, J.A. at 91). Under Texas law, any monument on the Capitol grounds must be approved by the state legislature; erecting a monument without legislative approval is a criminal offense punishable by imprisonment and an impeachable offense if done by a government official. Texas Gov't Code §2165.255. The monument was a gift of the Fraternal Order of Eagles and was accepted by a joint resolution of the Texas House and the Texas Senate in early 1961. Tex. S. Con. Res. 16, 57th Leg. R.S., 1961 Tex. Gen. Laws 1195-1196, Exhibit 1 (J.A. at 97). The resolution also authorized the placement of the monument on the Capitol grounds. *Id.*

The State selected the site for the monument based on the recommendation of the Building Engineering and Management Division of the State Board of Control. Exhibit 2 (J.A. at 101). The expenses of its construction were borne by the Eagles.

The Legislature said little about why it chose to accept the monument. The parties to this litigation stipulated that the legislative history "contain[s] no record of any discussion about the monument, or the reasons for its acceptance, and is comprised entirely of House and Senate journal entries." (Stipulation 3, J.A. at 91). The parties also stipulated that the dedication of the monument was

presided over by Texas Senator Bruce Reagan and Texas Representative Will Smith. *Id.*

The State Preservation Board, an agency of the State of Texas, was created by the Legislature in 1983. Texas Gov't Code §443.001. Ownership of the Capitol Building, including the Ten Commandments monument, was soon transferred to the Board. The Board is vested with and exercises broad authority over the Capitol Building and grounds, including maintaining the Ten Commandments monument. (Stipulation 13, J.A. at 92).

In 1990, Board directed that the Ten Commandments monument be removed and placed in storage during construction of the Capitol extension. (Stipulation 10, J.A. at 91-92). Not every monument removed during the construction was replaced after being taken down. However, in 1993, the State Preservation Board decided to place the Ten Commandments monument back in its prior location, but turned it to face in a different and more prominent direction: directly facing the corner of the two sidewalks that intersect in front of the Texas State Capitol and the Texas Supreme Court. 351 F.3d at 181, Appendix to Cert. Pet. at 15; R.T. at 85. The State paid the costs of removal, storage and reinstallation of the monument. (Stipulation 11, J.A. at 92).

The State is responsible for all of the costs of maintaining the monument. (Stipulations 18 J.A. at 93). The expenses consist of regularly washing and polishing the monument, which is handled by the State Preservation Board. *Id.*

The plaintiff, Thomas Van Orden, is a resident of Austin, Texas and brought this action to have the Ten Commandments monument removed from the grounds of

the State Capitol as violating the Establishment Clause of the First Amendment. The District Court entered judgment for the defendants, and the United States Court of Appeals for the Fifth Circuit affirmed. The Court of Appeals concluded that Texas had permissible secular purposes in placing the monument on government property: honoring the Fraternal Order of Eagles, the monument's donor, for its work against juvenile delinquency, and commemorating the Ten Commandments' "influence upon the civil and criminal laws of this country." 351 F.3d at 173, 181, App. to Cert. Pet. at 9. The Court of Appeals also stated that the Ten Commandments monument did not have the effect of impermissibly endorsing religion because it was one of a number of displays outside, and inside, the Capitol buildings. 351 F.3d at 175-76, App. to Cert. Pet. at 3.

Van Orden's motion for rehearing and suggestion for rehearing *en banc* were denied. His petition for a writ of certiorari was granted on October 12, 2004.

SUMMARY OF ARGUMENT

At the very seat of Texas government, between the Texas State Capitol and the Texas Supreme Court, is a large monument quoting a famous passage of religious scripture taken, almost verbatim, from the King James Bible. The Ten Commandments are a crucial symbol to many religions and express an unequivocal religious message: There is a God and God has proclaimed rules for behavior. The monument, shaped in the form of the tablets that some religions believe God gave Moses, has at its top, in large letters: "I AM the LORD thy GOD." The

commandments that follow express God's dictates for how people should conduct their religious worship and their personal behavior.

The large Texas Ten Commandments monument violates the Establishment Clause for three separate reasons. First, the government is impermissibly discriminating in favor of some religious denominations and sects. This Court long has held that the government may not favor or prefer one religion over others. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (the Establishment Clause means that no State can "pass laws which aid one religion" or that "prefer one religion over another"). Indeed, this Court has declared that there is an "absolute prohibition" against such favoritism. *Abbington School Dist. v. Schempp,* 374 U.S. 203, 225 (1963).

But the Texas Ten Commandments monument is exactly this type of impermissible government favoritism: the government is expressing the religious beliefs of some religions. Many prominent religions, such as Buddhism and Hinduism, reject the Ten Commandments' view that there is a single God who dictates rules for behavior. Even among religions that accept the Ten Commandments, there are significant differences in the content of each religion's version of the Ten Commandments. The Texas Ten Commandments monument is virtually identical to the Protestant version. This government favoritism of one religion, over all others, violates the Establishment Clause.

Second, the government has no permissible secular purpose for placing the Ten Commandments monument at the seat of Texas state government. This Court repeatedly has held that government actions violate the Establishment

Clause if there is not an actual secular purpose. *See Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (invalidating a state law requiring teaching of "creation science" because of the lack of a secular purpose); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (invalidating a state law requiring a moment of "silence" because of the absence of a secular purpose).

The Ten Commandments are a religious symbol and express a religious message. In *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam), this Court declared unconstitutional a Kentucky law requiring the posting of the Ten Commandments in public schools and expressly rejected the claim that there is a secular purpose, such as commemorating the role of the Ten Commandments as a source of law, that justifies their presence on government property. The Court emphasized the inherently religious content of the Ten Commandments and found that there was no secular reason for their being prominently displayed by the government. *Id.* at 41-42. Texas placed the Ten Commandments monument on government property for exactly the same impermissible reason: to express its religious message.

Third, the Ten Commandments monument has the impermissible effect of symbolically endorsing religion. This Court has stressed that a government action violates the Establishment Clause if it symbolically endorses religion or a particular religion. *See, e.g., County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 592 (1989) (invalidating a nativity scene by itself on government property). It is well-settled that "[w]here the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause

is violated." *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

The reasonable observer would surely see the Ten Commandments monument as the government endorsing religion because of its *placement*, its *context*, and its *content*. The placement of the monument, at the very seat of Texas state government, means that "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." *Allegheny County*, 492 U.S. at 599-600 (O'Connor, J., concurring in part and concurring in the judgment) (invalidating a nativity scene in a county courthouse). The context of the monument reinforces its endorsement of religion. The monument sits by itself at the corner between the Texas State Capitol and the Texas Supreme Court. It is the only expression of a religious message on the Capitol's grounds. Finally, the content of the monument is overtly religious: a scriptural passage that many religions regard as fundamental, in the shape of religious tablets, and accompanied by unmistakable religious symbols such as Jewish stars and Greek characters representing Christ.

If the State displayed a creche in the manner and at the place where the Ten Commandments monument is located, its action would be unquestionably unconstitutional under this Court's ruling in *Allegheny County*. 492 U.S. at 621. The Ten Commandments monument at least as clearly violates the Establishment Clause because it is a permanent display that favors particular religions, that lacks any secular purpose, and that conveys the government's endorsement for a profoundly religious message.

ARGUMENT

I. THE TEN COMMANDMENTS MONUMENT EXPRESSES A RELIGIOUS MESSAGE AND IS A RELIGIOUS SYMBOL.

A. The Ten Commandments Are Religious In Their Origin And Their Content.

The Ten Commandments are derived from the Bible and are an important symbol to some, but not all religions. *See, e.g.,* Robert I. Kahn, *The Ten Commandments for Today* 3 (1964) ("the Ten Commandments have always been central both to the Jewish and Christian religions.") They are found in Chapter 20 of the Book of Exodus and are repeated in Chapter 5 of Deuteronomy. Exodus 20:2-17, Deuteronomy, 5:6-21. The Ten Commandments express a message that is thoroughly and essentially religious: there is a God and that God has decreed rules for behavior. These include rules for religious observance, such as, "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images," "Thou shalt not take the name of the Lord thy God in vain," and "Remember the Sabbath Day." There also are rules governing behavior that is not on its face religious, such as, "Thou shalt not kill," "Thou shalt not commit adultery," and "Thou shalt not steal." But in the Ten Commandments these prescriptions, too, convey and define God's command and rule. They are not secular; they express a religious faith and vision.

This, of course, is not the first time that this Court has considered a Ten Commandments display on government property. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), invalidated a Kentucky law requiring the posting of the Ten Commandments in public school classrooms. In

declaring the posting of the Ten Commandments unconstitutional, this Court explained that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." 449 U.S. at 41. Kentucky claimed that it required the posting of the Ten Commandments because of their importance as a foundation for the legal system and, in fact, the bottom of each display contained the statement: "The secular application of the Ten Commandments is seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 1978 Ky. Acts, ch. 436, §1 (effective June 17, 1978), Ky.Rev.Stat. §158.178 (1980).

The Court rejected this attempt to mask a religious message with a secular veil and noted that the first half of the Ten Commandments are entirely about religion: "The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness and covetousness. Rather, the first several Commandments concern the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day." *Stone,* 449 U.S. at 41-42 (citations omitted).

The religious nature of the monument between the Texas State Capitol and the Texas Supreme Court is clearly conveyed by its format. The monument is in the shape of the tablets which some religions believe that God gave to Moses. At its very top, in letters larger than used on the rest of the monument, are the words "I AM the LORD thy GOD." As Justice Stevens explained: "[The phrase] 'I AM the LORD thy GOD' . . . is rather hard to square with the proposition that the monument expresses

no particular religious preference – particularly when considered in conjunction with ... [the fact] that the monument also depicts two Stars of David and a symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ." *Elkhart v. Books,* 532 U.S. 1058 (2001) (Stevens, J., opinion respecting denial of certiorari).

The Ten Commandments are no less religious because they are important to more than one religion. *See County of Allegheny v. American Civil Liberties Union,* 492 U.S. at 615 (Blackmun, J.) (the government's endorsement of Judaism and Christianity violates the Establishment Clause in the same way as endorsement of Christianity alone). The Ten Commandments are not a part of all religions and indeed many faiths reject the religious concepts contained within them. Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere,* Fordham L. Rev. (forthcoming 2005) ("the commandments have no place in Hinduism, Buddhism, Taoism or other non-western faiths. Moslems consider the Jewish Bible to be a holy text, and thus the Ten Commandments may have some religious value, but are clearly not central to the faith.") Other religions regard different symbols as much more important to their beliefs than the Ten Commandments. *See, e.g., SUMMUM v. Ogden*, 297 F.3d 995 (10th Cir. 2002) (freedom of expression requires that the Summum faith be allowed to place a Seven Aphorisms Monument next to the Ten Commandments monument on government property); *SUMMUM v. Callaghan*, 130 F.3d 906 (10th Cir. 1997) (court ordered Salt Lake City to place a Seven Aphorisms Monument next to the Ten Commandments monument on government property; the city removed the Ten Commandments monument instead.)

The Ten Commandments are not a general reference to God in a civil context, such as "In God We Trust" on coins. Nor are they universal to all religions. They are derived entirely from certain religious scriptures and they express a specific religious message that only some religions accept. They are thus a clear "government statement that religion or a particular religious belief is favored or preferred." *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. at 773 (O'Connor, J., concurring in part and concurring in the judgment) (citation omitted).

B. Differing Religions Have Varying Versions Of The Ten Commandments And The Choice Of A Version Prefers Some Religions Over Others.

The Fifth Circuit described the monument as displaying "a nonsectarian version of the text of the Commandments." 351 F.3d at 176, App. to Cert. Pet. at 4. This assertion is doubly mistaken: in addition to ignoring the inherently sectarian nature of a religious text deemed holy by only some religions, the Fifth Circuit failed to realize that there is no neutral or nonsectarian form of this particular text shared among religions that do embrace it.

What Texas has placed on its capitol grounds is a version of the Ten Commandments accepted by certain Protestant denominations, but rejected by other Christians as well as Jews. The Texas monument, like others donated around the country by the Fraternal Order of Eagles, "with the exception of some minor word changes in the fourth and fifth line of the text, dealing with 'graven images,' ... is exactly the same as in the King James version of the Bible.... [T]he structuring of the Commandments is identical to the Lutheran catechism."

Finkelman, *supra*, at 18. *See* David Noel Friedman, *The Nine Commandments* 15-16 (2000) (comparing different versions of the Ten Commandments). By choosing one version of the Ten Commandments, Texas has taken sides on a matter of great significance to many religions and religious individuals: the proper way to read and understand a central text of their faiths.

Indeed, "there are at least five distinctive versions of the Decalogue. In some cases the differences among them might seem trivial or semantic, but lurking behind the disparate accounts are deep theological disputes." Steven Lubet, *The Ten Commandments in Alabama*, 15 Const. Comment. 471, 474 (1998).** The Jewish biblical text is comprised of thirteen sentences that are the basis for the Ten Commandments; in Christian texts there are seventeen sentences that are grouped together to form the Ten Commandments. *See* W. Gunther Plaut, ed., *The Torah: A Modern Commentary* 534 (1981). Religions differ greatly in how they present the Ten Commandments and the choice of one version inherently prefers one religion over others.

For example, in Jewish versions of the Ten Commandments, the first commandment is: "I the Lord am your God who brought you out of the land of Egypt, the

** The Protestant version of the Ten Commandments can be found in *The Heidelberg Catechism, Question and Answer 92*, in *Psalter Hymnal* 903-04 (1987). The Catholic version can be found in United States Catholic Conference, Inc., *Catechism of the Catholic Faith* 561 (1991). The Lutheran version can be found in *Luther's Catechism: The Small Catechism of Dr. Martin Luther and an Exposition for Children and Adults Written in Contemporary English* 53 (1982). The Jewish version can be found in 5 *Encyclopedia Judaica* 1442-43 (1971); Solomon Goldman, *The Ten Commandments* 19-20, 28-29 (1956).

house of bondage." Plaut, *supra,* at 534. In the Protestant version, the first commandment is, "Thou shalt have no other gods before me"; in the Catholic version it is, "I am the Lord thy God. Thou shalt not have strange gods before me." Bruce M. Metzger and Michael D. Coogan, eds., *The Oxford Companion to the Bible* (1993). The monument between the Texas State Capitol and the Texas Supreme Court adopts the Protestant version of the first commandment. *See* Exhibit 21 (J.A. at 137).

The second commandment also varies among religions. For Jews, the second commandment states: "You shall have no other gods besides me. You shall not make for yourself a sculptured image." Plaut, *supra,* at 534. In contrast, the Catholic version of the second commandment is, "Thou shalt not take the name of the Lord thy God in vain." The "prohibition against graven images, included in the Jewish Second Commandment, is not found anywhere in the version used in the standard Catholic catechism." Lubet, *supra,* at 475. The Texas monument adopts the Lutheran version which places "Thou shalt not make to thyself any graven images" as part of the first commandment. Exhibit 21 (J.A. at 137).

These differences in the first two commandments among religions are reflected throughout the texts of the varying versions of the Ten Commandments. The fact that Jews, Catholics, Lutherans, and other Protestants all have different first and second commandments leads to a different numbering system throughout the rest of the commandments. For example, the seventh commandment for Catholics is a prohibition on stealing, while this is the sixth commandment for Protestants and Jews.

The Catholic religion separates the prohibition against coveting into two separate commandments. The ninth commandment prohibits coveting "thy neighbor's wife"; the tenth prohibits coveting his goods. The Jewish religion, and most Protestant sects, combine all the prohibitions against coveting into the tenth commandment. Lutherans, however, separate them into the ninth and tenth commandments, but in a way that is different from Catholics. Like the monument in this case, Lutherans make the penultimate commandment the prohibition against coveting "thy neighbor's house" and the last commandment the prohibition against coveting his wife, goods, servants, and cattle.

Differences in the content among the religions and their versions of the Ten Commandments often matter enormously. For instance, the Jewish version of the Ten Commandments says, "You shall not murder." Plaut, *supra*, at 534. But the King James Version of the Bible, which is the basis for the Texas monument, says, "Thou shalt not kill." Exhibit 21 (J.A. at 137). Some religions place great weight on this difference, seeing the prohibition on all "killing" as broader than the outlawing of murder. Plaut, *supra*, at 557 ("Hence the claim of pacifists, who would see this command as a prohibition of killing including that legitimized by the state during warfare cannot be sustained [under the Jewish version]. The same is true of abolition of capital punishment.")

The differences in the wording of the Second Commandment among religions also are extremely important to matters of religious faith and practice. The Catholic Church's version, unlike those of most other religions, does not prohibit graven images. This reflects fundamental differences in religious practices and has been a source of

great tension, and even violence, among religions since at least the Reformation. *See* John C. Holbert, *The Ten Commandments* 10 (2002) ("The reformers of the sixteenth century (especially the radical followers of Calvin) ... use[d] the second commandment as part of their violent polemic against what they thought were the idolatries of the Roman Catholicism.... Statues of Mary, as well as those of many saints, were repugnant to many reformers, and the second commandment became a weapon against their use.") Indeed, even in more recent times, the differing content of the second commandment among religions is a source of conflict and tension. *See, e.g.*, Joseph Lewis, *The Ten Commandments* 26 (1946) (accusing Catholics of having "a mutilated set of Commandments"); Holbert, *supra* at 25 (describing conflicts resulting from varying versions of the second commandment).

Texas in placing this monument on government property is thus making an inherently sectarian choice by adopting the Protestant faith's version of the Ten Commandments. For the State of Texas to declare a prohibition on graven images offends the religious precepts of Catholics. The monument's prohibition of killing, as opposed to murder, is inconsistent with the Jewish Bible. And the entire monument is an affront to adherents of other religions which do not include the Ten Commandments in their scripture and, in fact, reject much of what it expresses.

II. THE GOVERNMENT'S PLACEMENT OF A LARGE TEN COMMANDMENTS MONUMENT BETWEEN THE TEXAS STATE CAPITOL AND THE TEXAS SUPREME COURT VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT FAVORS SOME RELIGIONS OVER OTHERS, BECAUSE THERE IS NO SECULAR PURPOSE, AND BECAUSE THE EFFECT IS IMPERMISSIBLY TO ENDORSE RELIGION.

The large Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court is unconstitutional for three separate reasons. First, the State is impermissibly discriminating among religions by placing a religious symbol and a message accepted by some religions and not others at the seat of the Texas state government. *See, e.g., Abbington School Dist. v. Schempp,* 374 U.S. 203, 225 (1963) (the government may not discriminate among religious sects). Second, there is no secular purpose in a religious message being prominently displayed on government property. *See, e.g., Stone v. Graham*, 449 U.S. at 41 (Ten Commandments displays in public schools deemed unconstitutional because of the lack of a secular purpose). Third, the clear and unequivocal effect of the Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court is an impermissible government endorsement of religion. *See, e.g., Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original) ("when the reasonable observer would view a government practice as endorsing religion, I believe that it is our *duty* to hold the practice invalid.")

A. The Ten Commandments Monument Violates The Establishment Clause Because It Favors Some Religions Over Others.

This Court long ago ruled that "[t]he state may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . *This prohibition is absolute.*" *Abbington School Dist. v. Schempp,* 374 U.S. at 225 (emphasis added). The Court later explained that "Madison's vision – freedom for all religions being guaranteed by free competition among religions – naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference." *Larson v. Valente*, 456 U.S. 228, 245 (1982). Thus, this Court has concluded that "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id.* at 246.

The Texas Ten Commandments monument is a "denominational preference": it is a religious symbol and conveys a religious message adopted by some religions and not others, and indeed expresses one faith's version of the Ten Commandments at the seat of the Texas state government. Such favoritism is absolutely prohibited under *Schempp* and, at the very least, the Fifth Circuit erred by not applying *Larson v. Valente* and requiring that the State meet strict scrutiny to justify such favoritism for some religions over others.

Under that test, the Texas monument is clearly unconstitutional. There is no compelling reason for having a Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court. Any secular message surely could be expressed in other, non-religious, ways.

This favoritism is sufficient by itself to have the Texas Ten Commandments monument declared unconstitutional, for this Court has stressed that the "history and logic of the Establishment Clause [mean] that no State can pass laws which aid one religion or that prefer one religion over another." *Larson v. Valente*, 425 U.S. at 245 (citation omitted).

B. The Ten Commandments Monument Violates The Establishment Clause Because There Is No Legitimate Secular Purpose For The State's Installing It On Government Property Between The Texas State Capitol And The Texas Supreme Court.

This Court also has been clear that a government action violates the Establishment Clause unless there is a valid secular purpose for it. *See, e.g., Stone v. Graham,* 449 U.S. at 41; *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971). As the Court has explained, the purpose inquiry "asks whether the government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987).

There is not a secular purpose for placing a six-foot high, three-feet wide monument containing passages from the Bible of some religions, and adorned with a representation of Christ and Stars of David, at the heart of Texas state government between the Capitol and the Supreme Court. The parties to this litigation stipulated that the legislative history "contain[s] no record of any discussion about the monument, or its reasons for acceptance." (Stipulation 3, J.A. at 91). Therefore, it is impossible for the State to meet this Court's requirement that the government show an "actual purpose" that is secular. *Edwards v. Aguillard*,

482 U.S. at 585 (quoting *Lynch v. Donnelly,* 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

Nonetheless, in the absence of a demonstrable "actual purpose," the Court of Appeals speculated that there were two permissible secular purposes for the monument. First, the court said that "the purpose of the legislature was 'to recognize and commend a private organization for its efforts to reduce juvenile delinquency.'" 351 F.3d at 179, App. to Cert. Pet. at 9. This was based entirely on the Texas legislature's resolution granting the Eagles permission to erect the monument. *Id.* But in accepting this rationale, the Court of Appeals violated this Court's command that courts "distinguish a sham secular purpose from a sincere one." *Santa Fe Indep. School Dist. v. Doe,* 530 U.S. 290, 308 (2000).

It strains credulity to say that the Texas legislature installed the Ten Commandments monument to condemn juvenile delinquency or to praise the Fraternal Order of Eagles. It makes no sense to suggest that the posting of a Biblical passage that makes almost no reference to juveniles was motivated by a concern over delinquency. The monument itself says nothing about the issue. Nor is there any indication that the Fraternal Order of Eagles engaged in programs in Texas or that the Texas legislature really had any familiarity with its efforts. There were countless ways that Texas could have praised the Fraternal Order of Eagles if it wished to do so; accepting a gift from an organization is a dubious way of honoring it. Placing the monument on government property obviously was all about its content, the Ten Commandments, and the State's desire to express and exalt this religious text.

At most, acknowledging the Fraternal Order of Eagles efforts may have coincided with the acceptance of the gift, but hardly can be said to be the reason that the State posted the Ten Commandments between the Texas State Capitol and the Texas Supreme Court. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring) (the requirement for a secular purpose is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes.")

Moreover, the Fifth Circuit erred in focusing on just the time at which the monument was accepted and not on when the State took the monument out of storage and reinstalled it. The State Preservation Board took the monument down in 1990 and put it back facing in a different, more prominent position in 1993. (Stipulations 10, 11, J.A. at 91-92). Other monuments that were removed at the same time were never put back on display. There is no indication that the State's goal in 1993 was to honor the Fraternal Order of Eagles. The State has given no reason for this Court to doubt that the State put the monument back, and in a prominent place, because of the State's desire to express the content of the monument, the Ten Commandments.

This Court has explained that "[w]hile the Court is normally deferential to a State's articulation of a purpose, . . . the statement of such purpose [must] be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. at 586-87. For the State to claim that its purpose was anything other than presenting the Ten Commandments is such a "sham."

Second, the Court of Appeals found an alternative permissible purpose, declaring the "Commandments have a secular dimension as well as a religious meaning." 351

F.3d at 179. However, there is no indication that this was the legislature's purpose in placing the monument on government property and this Court has stressed that the focus must be exclusively on the government's "actual purpose." *Edwards v. Aguillard*, 482 U.S. at 585.

Moreover, as this Court recognized in *Stone v. Graham*, the Ten Commandments are inherently religious. There is no secular purpose in placing on government property a monument declaring: "I AM the LORD thy God. Thou shalt have no other gods before me. Thou shalt not make thyself any graven image. Thou shalt not take the Name of the Lord thy God in vain." As the Court declared in *Stone v. Graham*, "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." 449 U.S. at 42. The same is true in placing the Ten Commandments between the Texas State Capitol and the Texas Supreme Court.

The Court of Appeals stressed the Ten Commandments' "influence upon the civil and criminal laws of this country." 351 F.3d at 181, App. to Cert. Pet. at 14-15. But characterizing the Ten Commandments monument as secular and as a source of American law is incorrect for many reasons. First, the format of the Ten Commandments monument conveys its religious message, not its secular role. For example, the size of the lettering on the monument emphasizes the religious aspect of the Ten Commandments over the secular. The prefatory words, "I AM the LORD thy GOD," appear larger on the monument than the commandments that have been incorporated into secular law. The Commandments' prohibitions on murder, adultery, and theft are smaller than the text which identifies God as the source of the commandments. By visually emphasizing the religious aspects of the Ten Commandments

relative to the arguably secular, the monument belies the claim that it is commemorating any secular role of the Ten Commandments in American law.

Second, the content of the commandments themselves shows that it has little relationship to American secular law. The first four commandments listed – "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images," "Thou shalt not take the name of the Lord thy God in vain," "Remember the Sabbath day to keep it holy" – are religious mandates. Any law that imposed these requirements would unquestionably violate the Establishment Clause. As Professor Marci Hamilton explains: "[W]ere the first four commandments enacted into law today, they would constitute plain constitutional violations. It is an exceedingly strange, and strained, argument that argues the primacy of the Ten Commandments as the true source of law when the first four simply *cannot* be enacted into law, because they would conflict with our Constitution. The first four prove that the Commandments are religious rules, not civil law." Marci Hamilton, *The Ten Commandments and American Law*, at http://writ.news.findlaw.com/hamilton/20030911 (September 11, 2003).

Moreover, several of the other commandments have no relationship at all to American law. "Honor thy father and mother" and "Thy shalt not covet thy neighbor's wife, nor his manservant, nor his maid servant, nor his cattle, nor anything that is thy neighbors" are not, and never have been, legal commands in our legal tradition.

Thus, only a few of the commandments – "Thou shalt not kill," "Thou shalt not steal," "Thou shalt not bear false witness against thy neighbor," and "Thou shalt not commit

adultery" – have any relationship to American law. But even as to these, the Ten Commandments are not a special source for the American legal rules: virtually every legal system, before and after the Ten Commandments, prohibits murder, theft, and perjury. *See* Steven K. Green, *The Fount of Everything Right and Just*, 14 J.L. & Religion 525 (2000). Indeed, Hammurabi's Code, often regarded as the first written law, nearly a 1,000 years before the Ten Commandments, contained these prohibitions. *The Hammurabi Code* at ix (trans. Chilperic Edwards, 1904) (criticizing what he calls "arrogant claims in regard to the originality or excellence of the Jewish Pentateuch.") Why does Texas have a monument to the Ten Commandments and not Hammurabi, or the Magna Charta, or any other source of law? Precisely because the Ten Commandments conveys an explicit religious message that these other sources of law do not.

Third, a careful review of history shows that the Ten Commandments were seldom invoked in forming American law. The only explicit connection between the Bible and American law is found in the early Puritan colonies of Massachusetts and Connecticut. The Puritans regarded themselves as "chosen people" and their land as a "second Israel." Stephen Botein, *Early American Law and Society* 25-26 (1983). But even among the Puritans, the influence of Mosaic law on their legal codes was small. *See* Zechariah Chaffee, Jr., *Colonial Courts and the Common Law, Essays in the History of Early American Law* 72-73 (D. Flaherty ed., 1969) ("the view that the colonial law was . . . drawn from the Bible is dispelled by a study of the court records ."); George E. Woodbibe, *The Suffolk County Court, 1671-1680, Essays in the History of Early American Law* 202 (D. Flaherty, ed. 1969) ("Undoubtedly the influence of

[Mosaic] law as an active legal force in [Puritan] civilization has been greatly overstated.")

Nor is there any indication that the Ten Commandments were regarded as a source of secular law in the founding of this nation. They are not mentioned in the records of the Constitutional Convention nor in the history of state legislatures drafting their initial statutes. Not once are the Ten Commandments mentioned in the *Federalist Papers*. After examining the claim that Ten Commandments were a source of American law, Professor Steven Green concludes: "Thus absent a handful of early cases, judicial reliance on the Ten Commandments as a source of law was all but nonexistent. . . . The historical record fails to support claims of a direct relationship between the law and the Ten Commandments. Absent the failed experiment in seventeenth century Massachusetts and other Puritan colonies, American law has generally been viewed as having a secular origin and function." Green, *supra*, at 558.

The irony is that those who favor the Ten Commandments on government property, such as here between the Texas State Capitol and the Texas Supreme Court, do so precisely because of the religious content of the Ten Commandments and the importance of the Decalogue as a religious symbol. Yet, supporters of Ten Commandments monuments are forced to defend them as secular, as the Fifth Circuit did here. 351 F.3d at 181, App. to Cert. Pet. at 14-15. This denigrates religion by denying the essential and profoundly religious nature of the Ten Commandments. *See, e.g.*, Ronald S. Wallace, *The Ten Commandments* viii (1965) ("the Ten Commandments . . . are one of the important focal points within the Bible. If they have been given prominence within the discipline of the

[Protestant] Church, this is simply because they have prominence within the Word which the Church has sought to obey.")

There is no secular purpose for the Ten Commandments being prominently displayed between the Texas State Capitol and the Texas Supreme Court, any more than there was a valid secular purpose for the Ten Commandments being posted in public school classrooms in *Stone v. Graham*. Here, as in that case, the government's purpose is to advance religion and thus to violate the Establishment Clause.

C. The Large Ten Commandments Monument Between The Texas State Capitol And The Texas Supreme Court Violates The Establishment Clause Because It Is An Impermissible Government Endorsement of Religion.

This Court also has been clear that a government action violates the Establishment Clause if it symbolically endorses religion or a particular religion. *See, e.g., Allegheny County,* 492 U.S. at 592 ("In recent years, we have paid particularly close attention to whether the challenged governmental practice has either the purpose or effect of 'endorsing' religion, a concern that long had a place in our Establishment Clause jurisprudence.") As Justice O'Connor explained: "As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not [be] . . . conveying a message that religion or a particular religious belief is favored or preferred." *Allegheny County,* 492 U.S. at 627 (O'Connor, J., concurring in part and concurring in the judgment); *see also Capitol Square Review and Advisory Board,* 515 U.S. at 777 (O'Connor, J., concurring in part

and concurring in the judgment) (the Establishment Clause is violated "when the reasonable observer would view a government practice as endorsing religion.")

Assuming a secular purpose, not every display of the Ten Commandments is unconstitutional, just as not every nativity scene on government property violates the First Amendment. *Compare Lynch v. Donnelly*, 465 U.S. 668, 671, 680 (1994) (upholding a nativity scene as part of a larger holiday display), *with Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. at 621 (invalidating a nativity scene by itself on government property). For example, a reasonable observer might be more likely to understand the government's asserted secular message if the Ten Commandments monument is installed as part of a larger display depicting various sources of law, with several religious and secular monuments of the same size grouped together.***

The frieze on the wall of the Supreme Court is exactly this type of permissible display. The frieze depicts Moses holding the Ten Commandments – quite significantly without any writing on the tablets and therefore without any explicit religious message being conveyed. Additionally, there are two other religious figures on the frieze, Confucius and Mohammed, and many secular figures including Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall. As Justice Stevens explained, the placement of all of these historical figures together on the frieze signals a respect for great lawgivers,

*** Different issues arise if the secular displays are not added until after an Establishment Clause challenge has been filed. The reasonable observer presumably would be aware of that history as well. *See Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309 (2000).

not great proselytizers. *Allegheny County*, 492 U.S. at 652 (Stevens, J., concurring in part and dissenting in part).

But that is not at all the case here. The Ten Commandments sits by itself, in a prominent position between the Texas State Capitol and the Texas Supreme Court, with no other monuments visible when standing before it. Exhibits 48, 53, 57 (J.A. at 210, 211, 212) (photographs showing no other monument adjacent to or visible from the Ten Commandments monument). There is no other religious monument anywhere on the grounds of the State Capitol. The "reasonable observer" who sees the Ten Commandments monument can draw but one conclusion: that the State of Texas endorses the religious views expressed on it.

This Court has explained that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly,* 465 U.S. at 694. Three factors make it likely that the "reasonable observer" would see this Ten Commandments monument as impermissibly endorsing religion: its placement, its context, and its content.

1. The placement of the Ten Commandments Monument

This Court has recognized that a display at the seat of government, so plainly under government ownership and control, is marked with the government's seal of approval. *Allegheny County*, 492 U.S. at 599-600. The State Capitol Building and its 27 acres of grounds are the seat of government in the State of Texas. The Ten Commandments

monument is located at the intersection of two sidewalks, one that runs in front of the State Capitol building and the other in front of the Texas Supreme Court. (J.A. at 50). The monument is 75 feet from the Texas State Capitol, which houses the Texas State Legislature and the Texas Governor's office. (Stipulation 31, J.A. at 95). The monument is 123 feet from the Texas Supreme Court building, which houses the Texas Supreme Court, the Texas Court of Criminal Appeals, some offices of the State Attorney General, and the Texas State Law Library. The monument immediately abuts the "Great Walk," which tightly encircles the Capitol building, and it is angled so that anyone walking on these sidewalks from the Texas State Capitol to the Texas Supreme Court will see it prominently displayed.

In *Allegheny County*, the location of the nativity scene was crucial to the Court's conclusion that it violated the Establishment Clause. The Court noted that the creche was displayed in the main and most beautiful part of the county courthouse. As Justice O'Connor explained, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government. . . . [B]y permitting the display of the creche in this particular physical setting, the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message." 492 U.S. at 599-600 (O'Connor, J., concurring in part and concurring in the judgment).

Even more than the county courthouse in *Allegheny County*, no reasonable viewer could see the Ten Commandments monument in this case, directly in front of the Texas State Capitol and the Texas Supreme Court, without thinking that it has "the support and approval of the

government." An individual must pass through gates, many of which are guarded, to gain access to the State Capitol grounds. Texas law is clear and strict in providing that only the government can place monuments in the Capitol area. Texas law makes it a criminal offense, punishable by fine of up to $1,000 and imprisonment of up to one year if a "[p]erson, including a state officer or employee . . . without the prior express consent of the legislature . . . builds, erects, or maintains a building, memorial, monument, statue, concession, or other structure on Texas State Capitol grounds." Texas Gov't Code §2165.255. The Texas statute also provides that a state officer who violates this law "is subject to removal by impeachment" and that "[a]ny other state officer or employee who violates [this] shall be dismissed immediately from state employment." *Id.*

This complete government control over the area where the monument is located strongly communicates that the government is endorsing the religious message contained on the Ten Commandments monument. The "reasonable observer" would not even need to know the history of this Ten Commandments monument to understand that the government is responsible for it being on government property.

But the history makes the government's endorsement even clearer. *See Capitol Square Review & Advisory Board*, 515 U.S. at 779-780 (O'Connor, J., concurring in part and concurring in the judgment) (the "reasonable" observer knows "the history and context of the community and the forum in which the religious display appears.") First, as required by Texas law, the Texas legislature

formally accepted the monument and authorized its placement on the Capitol's grounds by a joint resolution of the House and the Senate. Tex. S. Con. Res. 16, 57th Leg. R.S., 1961 Tex. Gen. Laws 1195-1196, Joint Exhibit 1 (J.A. at 97). The State chose the location of the monument and placed it in a symbolically important position: between the Texas State Capitol and the Texas Supreme Court. (Stipulation 6, J.A. at 91).

Second, the State removed the monument for a period of time and then chose to put it back on government property in its current location. While other monuments in the area north of the Capitol were taken down and not replaced, in 1993, the State Preservation Board decided to return the monument to its original place on the Capitol grounds, between the Capitol and the Texas Supreme Court, and to position it so that it was angled for maximum viewing at the corner of the sidewalk running between these two buildings. 351 F.3d at 181; Tr. at 85.

This Court has made it clear that neither the inscription saying that the monument was donated by the Fraternal Order of Eagles nor that organization's funding of the initial construction lessen the symbolic endorsement of religion conveyed by this large monument expressing a religious message on government property. In *Allegheny County*, the nativity scene bore a similar dedication that it had been donated by a private group. 492 U.S. at 600. But the Court explained that "[t]he fact that the creche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion [of government endorsement.] On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own." *Id.* The case is even clearer here, for

this inscription implies, clearly and correctly, that it is the state which owns the monument. These Ten Commandments are, literally and constitutionally, the state's own words.

Nor does it matter that the monument was initially financed by the Fraternal Order of Eagles. In *Stone v. Graham*, the Court explained: "It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits." *Stone,* 449 U.S. at 42. The record is clear that the State of Texas authorized its installation in 1961; authorized and paid to have the Ten Commandments monument placed back on government property in 1993; and is responsible for the costs of maintaining the monument. (Stipulation 18, J.A. at 93). In *Stone v. Graham,* 449 U.S. at 42 n. 4, this Court found significant that "while the actual copies of the Ten Commandments were purchased through private contributions, the state nevertheless expended public money in administering the statue."

The placement of the Ten Commandments at the seat of Texas government, between the Texas State Capitol and the Texas Supreme Court, conveys unmistakable government endorsement for religion.

2. The context of the Ten Commandments monument

The Ten Commandments display sits on a corner by itself in front of the Texas State Capitol and the Texas Supreme Court. No other monument or display is next to, or even visible from, the Ten Commandments monument.

Exhibits 48, 53, 57 (J.A. at 210, 211, 212). The closest monuments in the area of the Ten Commandments, north of the State Capitol, are the Texas Pioneer Woman and a Tribute to Texas Children. The Ten Commandments monument is separated from these by 120 feet and 111 feet, respectively, (Stipulation 31, J.A. at 95), and by a number of rows of hedges which entirely block their view from the Ten Commandments monument. The other monuments in the area north of the Capitol, which are even further from the Ten Commandments monument, are a replica of the Statue of Liberty and a monument honoring veterans of Pearl Harbor. These also are not visible from the Ten Commandments monument. *See* Exhibits 48, 53, 57 (J.A. at 210, 211, 212)

Context is crucial in determining that there is a government symbolic endorsement of religion. In *Lynch*, this Court upheld a religious display, a nativity scene, because the viewer saw a creche as well as a Santa House, Santa, a Christmas tree, statues of carolers, and other traditional symbols of the December holiday season. 465 U.S. at 671, 680. The creche was part of a unified display, with all of the symbols within the view of the observer, concerning the holidays.

But the Ten Commandments display between the Texas State Capitol and the Texas Supreme Court is not part of such a unified display. The Ten Commandments does not fit into any overall theme for the monuments on the Capitol's grounds. Quite the contrary, as the *only* religious symbol in the area, the monument expresses clear endorsement for religion. Thus, the Ten Commandments monument is like the nativity scene that this Court declared unconstitutional in *Allegheny County*, and unlike

the one upheld in *Lynch*, because it is a solitary religious symbol on government property.

The Fifth Circuit, in upholding the Texas Ten Commandments monument, stressed the number of displays in the entire Capitol area, including inside the Capitol building and above the bench in the Supreme Court. 351 F.3d at 175-176, App. to Cert. Pet., at 3. The court explained: "The Ten Commandments monument is part of a display of seventeen monuments, all located on grounds registered as a historical landmark, and it is carefully located between the Supreme Court building and the Capitol Building housing the legislative and executive branches of government." 351 F.3d at 182, App. to Cert. Pet. at 17. In an effort to find other religious symbols, the court pointed to a Six Flags Over Texas Display on the floor of the Capitol rotunda, which contains a Mexican eagle and serpent that the court described as a "symbol of Aztec prophecy." *Id.* The court also noted that above the bench in the Texas Supreme Court is the Latin phrase, "Sicut Patribus, Sit Deus Nobis," which the court translated as saying, "As God was to our fathers, may He also be to us." *Id.*

The Fifth Circuit erred in describing the context of the display in this way. First, the appropriate focus must be on what the viewer of the Ten Commandments monument sees in looking at it and the area immediately around it. No other monuments are visible when looking at the Ten Commandments display and at most, four are in its immediate vicinity – the Pioneer Woman monument, the Texas Children monument, a Statue of Liberty replica, and the Pearl Harbor display. What is contained inside buildings is not relevant; there is no reason to believe that the reasonable observer who passes by this monument will go

in the buildings or associate the symbols there with the Ten Commandments. The Texas Capitol grounds encompass 27 acres. Surely it cannot be that a religious symbol anywhere on those grounds makes all other religious symbols anywhere on the property permissible.

This Court made exactly this point in invalidating the nativity scene in *Allegheny County*. In that case, a creche was displayed alone and the viewer saw only the creche and its floral flame. The Court declined the government's invitation to consider decorations throughout the building and in a nearby forum as part of the creche display. 492 U.S. at 598 n. 48. The Court obviously refused to assume that the viewer had taken a tour of the building or of the nearby areas. Context was restricted to what the viewer saw when observing the questioned display. Justice Blackmun included a photograph as an appendix to his opinion to show what the viewer looking at the creche would see. 492 U.S. at 622 (Blackmun, J.). In this way, the photograph of the Ten Commandments monument in this case is virtually identical in that the viewer sees a large Ten Commandments display unaccompanied by other symbols in its immediate area. Exhibits 48, 53, 57 (J.A. at 210, 211, 212)

Second, even if the entire area of the Capitol is viewed, there are not religious symbols anything like the Ten Commandments monument anywhere else on the grounds. The Fifth Circuit points to an image of a Mexican eagle and a serpent, which is part of a larger painting on the floor inside the Capitol rotunda, and says that this is religious because it is an Aztec symbol. It is doubtful that the reasonable observer would know this or think of a picture of an eagle and a serpent as religious. Likewise, the untranslated Latin phrase above the bench of the

State Supreme Court is unlikely to be understood as religious by the reasonable observer.

Third, in addition to being a symbol of some religions and commemorating a religious event, the Ten Commandments monument expresses a religious message. The monument unequivocally proclaims that there is a God and that God has decreed rules for religious observance and non-religious conduct. No other monument anywhere on the grounds of the Texas State Capitol conveys a religious message. Other monuments memorialize notable heroes and commemorate worthy acts; this one exalts and expresses one religion's view of God's commands.

As in *Allegheny County*, the Ten Commandments monument as the sole religious symbol and religious expression on government property is an impermissible symbolic endorsement of religion. Actually, the strong impression of government approval and endorsement of religion is even more compelling than in *Allegheny* because the display is permanent and viewed year-round, rather than temporary and viewed only at the holiday season. A temporary display placed on government property in the time between Thanksgiving and New Year's Day might be seen as celebrating the holidays. But a permanent display, such as the monument in this case, can convey only one message: government endorsement of the religious message contained on it. Many lower courts in determining what is an impermissible symbolic endorsement of religion have stressed that permanent displays convey a different, more obviously religious message. *See, e.g., Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001); *Books v. City of Elkhart*, 235 F.3d 292, 306 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); *Harris v. City of Zion*, 927 F.2d 1401, 1412 (9th Cir. 1991).

The Fifth Circuit, in this case, gave great weight to the fact that the display had been on the State Capitol ground for 42 years before a constitutional challenge was brought. 351 F.3d at 181, App. to Cert. Pet. at 17. But the monument's continued presence on government property magnifies, not lessens, the symbolic endorsement of religion. The reasonable observer who knows that the monument has been on government property for four decades would see it as the State of Texas long endorsing religion. A nativity scene at the seat of government for 42 years surely would be more, not less, offensive to the Establishment Clause than one placed there for a short period of time at the December holiday season.

3. The content of the Ten Commandments monument

The government's symbolic endorsement of religion is most obvious from the content of the monument itself. In large letters, the monument proclaims "I AM the LORD thy GOD" and many specific commandments profess religious mandates, such as, "Thou shalt not take the name of the Lord thy God in vain" and "Remember the Sabbath day, to keep it holy."

Moreover, the monument's other symbols heighten and highlight its endorsement of religion. At the bottom of the Ten Commandments monument there are two small Stars of David and two Greek letters, Chi and Rho, superimposed over each other to represent Christ. The monument also has, prominently displayed above the lettering, an American eagle grasping a flag.

First, the presence of symbols of Judaism and Christianity themselves endorse religion. As Justie Blackmun

explained: "The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." *County of Allegheny*, 492 U.S. at 615. (Blackmun, J.). The monument's containing symbols of two religions, but no others, violates the Establishment Clause because "it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and the accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. at 309-310 (citation omitted).

Second, the prominent placement of the American eagle gripping an American flag further expressly conveys the linkage between government and specific religions. As the Seventh Circuit explained in discussing an identical monument on government property: "In this regard, the placement of the American eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion, or more specifically these two religions, and civil government." *Books v. City of Elkhart,* 235 F.3d at 307. Just as the floral and evergreen decoration surrounding the creche display in the Allegheny County courthouse "contribute[d] to, rather than detract[ed] from, the endorsement of religion conveyed by the creche," *Allegheny County*, 492 U.S. at 599, the patriotic symbols on the Texas monument strongly contribute to the impression that the government itself is endorsing religion.

4. The location, the context and the content of the monument together are a clear symbolic endorsement of religion.

This Court has explained that a crucial question in Establishment Clause analysis is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval of their religious choices." *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985). The factors described above explain why adherents of "controlling denominations" will view the Ten Commandment as an endorsement of their religions and why nonadherents will see it as a "disapproval of their religious choices." Located at the very seat of Texas state government, the monument symbolizes and expresses a message of religious faith.

If Texas placed a nativity scene exactly where the Ten Commandments monument is located, there is no doubt that under this Court's decision in *Allegheny County*, that the Establishment Clause would be violated. The Ten Commandments monument in this case even more clearly violates the Establishment Clause because it expresses an unequivocal religious message by quoting from the scriptures of some religions.

In a recent opinion elaborating on when the government impermissibly endorses religion, Justice O'Connor pointed to four factors that should guide analysis: "History and ubiquity," "Absence of worship or prayer," "Absence of reference to particular religion" and "Minimal religious content." *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2323-326 (2004) (O'Connor, J., concurring in the judgment). These factors – especially the latter two

– strongly indicate that the Texas Ten Commandments monument violates the Establishment Clause.

As to the first factor, "history and ubiquity," Ten Commandments monuments of the sort involved in this case are of relatively recent origins and certainly are not ubiquitous in the way of "In God We Trust" on coins or the words "Under God" in the Pledge of Allegiance. As Professor Laycock explains: "[T]here is no long and ubiquitous history of large monuments displaying the text of the Commandments. . . . A few hundred monuments scattered around the country does not compare to 'our most routine ceremonial act of patriotism' repeated daily in more than a million classrooms." Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty,* 118 Harv. L. Rev. 155, 236 (2004).

As to the second factor, "absence of worship and prayer," the Ten Commandments monument is not an act of worship or prayer. But Justice O'Connor has explained that "[a]ny statement that has its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history." *Elk Grove Unified School District*, 124 S.Ct. at 2324 (O'Connor, J., concurring in the judgment). This Court already has recognized that this is exactly the effect of a Ten Commandments display. In *Stone v. Graham*, 449 U.S. at 42, in invalidating a law requiring the Ten Commandments be posted in public schools, this Court explained: "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce school children to read, meditate upon,

perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."

As for the third factor, "reference to particular religions," the Ten Commandments monument expressly favors some religions over others in that some regard the Decalogue as a core religious symbol, while other religions do not. Moreover, the striking differences among religions in their versions of the Ten Commandments requires the government to choose one religion over others. As described earlier, Texas chose the Protestant, King James, version of the Ten Commandments for its monument. This is crucial because this Court has declared that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. at 244. Indeed, Justice O'Connor recently stressed this when she declared, "no religious acknowledgment could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another." *Elk Grove Unified School District v. Newdow*, 124 S.Ct. at 2326 (O'Connor, J., concurring in the judgment). There is no general expression of law or morality in the Texas monument. Rather, this is state endorsement of a particular Christian sect's interpretation of a specific scriptural passage. The Texas Ten Commandments monument can be read only as choosing one religion's commandments over those of all other religions.

Finally, as to the last factor, it cannot be said that the Texas Ten Commandments monument has "minimal religious content." Justice O'Connor explains that "the brevity of a reference to religion or to God in a ceremonial

exercise can be important." *Id.* The reference to religion and God is not brief or minimal in the Ten Commandments monument. The words, in large letters, "I AM the LORD thy GOD," and the explicitly religious commands, make it clear that this is a religious proclamation. The reasonable observer surely knows that it is derived from the Bible. Rather than being minimal, religion obviously predominates the monument.

Thus, these four factors demonstrate that the Texas Ten Commandments monument's location, context, and content make it an impermissible symbolic endorsement of religion. *See* Laycock, *supra,* at 237-38 ("Large textual displays of the Ten Commandments should be an easy case under Justice O'Connor's four factors.") The "endorsement test does not prohibit government from acknowledging religion or from taking religion into account in making law and policy. It does preclude the government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring in the judgment). The Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court does precisely this by having the government express a religious message and, indeed, the religious beliefs of a particular religion whose version of the Decalogue is etched on this large stone tablet.

CONCLUSION

Texas has placed a large monument with the Ten Commandments at a uniquely prominent place between the Texas State Capitol and the Texas Supreme Court for one reason: the Ten Commandments are a religious message that is very important to certain specific religions. But it is for exactly this reason that the Ten Commandments monument violates the Establishment Clause of the First Amendment and the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
DUKE UNIVERSITY
SCHOOL OF LAW
Science Drive & Towerview Rd.
Durham, North Carolina 27708
(919) 613-7173

MARK ROSENBAUM
1616 Beverly Blvd.
Los Angeles, California 90026
(213) 977-9500

PAUL HOFFMAN
SCHONBRUN DISIMONE SEPLOW
HARRIS & HOFFMAN
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

ADAM B. WOLF
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, California 90095
(310) 206-5454